(13)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 1217

GEORGE H. KEYS, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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WILLIAM R. ROSS,
Kansas City, Missouri,
Attorneys for Petitioner.

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GEORGE H. KEYS, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petition of George H. Keys, for a writ of certiorari directed to the United States Circuit Court of Appeals of the Eighth Circuit, to bring before the Supreme Court the case of George H. Keys, Defendant-Appellant, against United States of America, Plaintiff-Respondent.

Said petitioner respectfully shows to this Honorable Court:

A.

SUMMARY OF MATTER INVOLVED.

(a) Petitioner was charged in the indictment with mailing a letter containing "a threat to injure the reputation of the addressee." The indictment (Appendix A)

was silent as to any legal right that had been threatened with invasion. The evidence disclosed that the act threatened to be done was distribution of a pamphlet, which pamphlet dealt with the subject of the harmful effects of aluminum kitchen utensils upon human health. There was no competent evidence of the falsity of its contents. In fact, counsel for respondent on page eleven of their Brief stated, the "question of their falsity was not an issue." At the close of the evidence petitioner's motion for discharge was overruled. In affirming the judgment, the Court of Appeals in its opinion stated:

> "* * * It is claimed, for example, that the indictment failed to charge that the pamphlet which defendant threatened to distribute contained false representations and that defendant knew them to be false. These matters are not elements of the offense defined in the statute. They are, therefore, immaterial. * * * None of these alleged omissions constitutes defects open to attack after verdict and in this court. None of them is an essential element of the offense. * * * (R. 64).

(b) The opinion stated that the offense had three essential elements: *First,* intent; *second,* transmission through the mails of a communication, and *third,* that said letter contained a "threat." The court thereupon and as a part of the third element undertook to describe the injury by quoting from the indictment as follows:

> "* * * the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases" (R. 61).

(c) The petitioner's eleventh assignment alleges a complete failure of evidence tending to establish that the petitioner threatened to violate or did violate any legal

right of the addressee, and that because thereof he was entitled to a discharge at the conclusion of the evidence. In Assignment fourteen, complaint is made that the

> "indictment herein utterly fails to aver facts disclosing that the alleged acts or threat of the defendant constitute a violation of a legal right of the addressee" (R. 55).

B.

STATEMENT OF BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code as amended by Act of Congress February 13, 1925, Ch. 229, 43 Stat. 938 (28 U. S. C. A. 347).

The judgment of affirmation sought to be reviewed was rendered on March 2, 1942 (R. 58); the Motion for Rehearing was denied March 26, 1942 (R. 68); Petition to Stay Issuance of Mandate was sustained April 6, 1942, and petitioner files his Petition for Writ of Certiorari within one month from April 6, 1942.

This action was based upon the laws of the United States, to-wit: Section 408d (c) of the Criminal Code as amended May 15, 1939, 18 U. S. C. A. 408d (c), the pertinent provisions of which are as follows:

> "Whoever with intent to extort from any person, firm, association or corporation, any money or other thing of value, shall transmit in interstate commerce by any means whatsoever any communication containing any threat to injure the property or reputation of the addressee * * * shall be fined not more than $500 or imprisoned not more than two years, or both."
>
> 18 U. S. C. A. 408d, Par. c.

The following cases, it is believed, sustain the jurisdiction of this Court to issue its Writ of Certiorari:

> *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479, 58 S. C. R. 300, 303.

Keogh v. *Ry. Co.*, 260 U. S. 156, 157.
Restatement of the Law of Torts, page 16, Section 7.
Burnsides v. *State*, (Tex.) 102 S. W. 118, 120, 121.
McKay v. *Retail Auto, etc., Union*, 106 Pac. 2d 373, 374, 379 (Calif.).
United States v. *Hess*, 124 U. S. 483, 487, 8 S. C. R. 571.
United States v. *Cruikshank*, 92 U. S. 542, 558.
United States v. *Carll*, 105 U. S. 611, 613.
Fontana v. *United States*, 262 Fed. 283, 288.

C.

QUESTIONS INVOLVED.

(a) Petitioner's position is that the term "injure" as used in the Statute means a wrong which directly results from the violation of a legal right; that therefore it was necessary that the indictment set forth sufficient facts to show that the thing threatened to be done was an act calculated to violate a legal right of the addressee.

(b) In undertaking to define the wrong charged, the indictment alleges:

> "* * * the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

It is not charged in the indictment that any of the statements in the pamphlet are false.

Our position is that the term "injury" is a generic term and it is therefore not sufficient that the indictment shall charge the offense in the same generic terms as the definition contained in the statute, but it must state the species—it must descend to particulars.

(c) The opinion assumes that the particulars which constitute the ingredients of the "injury" are not essential elements of the wrong. In this the opinion is in conflict with decisions of this court.

(d) The word "injury" has a definite legal significance, to-wit: the result or consequence of the invasion of a legal right or of violation of a legal duty. It also has a vernacular meaning of harm, unnecessarily preceded by the violation of a legal right. The term, therefore, being generic, it does not necessarily signify a legal wrong, as was held in the opinion below. It is an elemental rule of Criminal Law that when language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. Facts must be set forth so that the court can determine and not the pleader whether or not such facts constitute a crime. Our position rests upon decisions of this court to this effect. The opinion holds contrarily.

(e) 18 U. S. C. A., Section 408d, Par. c, is a new statute having been enacted in 1939, and has not as yet been construed. The phrase, "any threat to injure the property," etc., because of the double meaning of the word "injure" is ambiguous and uncertain. We claim the lower court erred in resolving this ambiguity in favor of the Government and against the petitioner in absence of evidence to support the same.

(f) The Government failed to adduce any competent evidence showing or tending to show a threat to circulate false statements regarding addressee. The trial court, however, overruled petitioner's motion for discharge, which action was upheld by the Court of Appeals. This we claim worked a substantial deprivation of petitioner's fundamental rights.

D.

REASONS FOR THE WRIT.

(a) The indictment herein failed to state what, if any, wrongful or unlawful act petitioner threatened to commit. No attack was made upon it in the trial court, but in the Circuit Court of Appeals said defect was attacked, being one of substance in that it consisted of the omission of an essential element of the offense charged. The opinion holds said attack came too late (R. 64). This is in conflict with the decision of *United States* v. *Hess,* 124 U. S. 483, and the following decisions of the 6th and 9th Circuits of the United States Circuit Court of Appeals: *Reimer-Gross Co.* v. *U. S.,* 20 F. 2d 36, 38 (C. C. A. 6); *Rasmussen* v. *Carpet Co.,* 31 F. 2d 88 (C. C. A. 9).

(b) The Court of Appeals failed to give effect to the legal definition of the term "injure" as stated by this court in the case of *Alabama P. Co.* v. *Ickes,* 302 U. S. 464. Attention to this controlling decision was particularly directed by petitioner in his main brief and in Motion for Rehearing (R. 65, 68).

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court for its review and determination on a day certain therein named a full and complete transcript of the record and proceedings in the case of George H. Keys, Appellant v. United States of America, Appellee, No. 12069, to the end that this cause may be reviewed and determined by this Court provided for in the Stat-

utes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court and that of the District Court reversed, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem met and just.

C. W. PRINCE,
WILLIAM R. ROSS,
Atttorneys for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

GEORGE H. KEYS, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION IN THE COURT BELOW.

The opinion of the Eighth Circuit Court of Appeals was filed March 2nd 1942. It was reported in 126 F (2d) 181, and is shown in full at page 58 of the printed record.

II.

JURISDICTION.

A complete statement of the basis of the jurisdiction of this court has been given under heading B of the petition *supra*. In the interest of brevity it is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has been given under heading A.

IV.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals of the Eighth Circuit erred

First: In holding that there was sufficient evidence in the record to authorize the submission of the case to the jury.

Second: In holding that the indictment contained sufficient allegations to charge an offense under Section 408d (c).

Third: In failing to give force and effect to the holding of this court in the case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479, 58 S. C. R. 300, 303, in defining the word "injury."

Fourth: In holding that the falsity of the pamphlet threatened to be distributed was not an essential element of the offense charged.

V.

SUMMARY OF ARGUMENT.

Point A.

The statement involved requires as a prerequisite to culpability a "threat to injure." The word "Injure" in its legal sense means to wrong a person by the violation of his legal rights, and damage to one without an injury does not lay the foundation for legal action.

A threat to disseminate the truth about aluminum such as that set forth in the pamphlet Exhibit 3 (R. 19)

is not a legal wrong, therefore not an injury, being *damnum absque injuria.*

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 479, 58 S. C. R. 300, 303.

Keogh v. *Ry. Co.,* 260 U. S. 156, 163.

Restatement of the Law of Torts, p. 16, Sec. 7.

Burnsides v. *State,* (Tex.) 102 S. W. 118, 120, 121.

McKay v. *Retail Auto., etc., Union,* 106 Pac. 2d 373, 374, 379 (Calif).

Point B.

The indictment (Appendix A, infra) is defective in that it fails to set forth facts showing or tending to show a threat by petitioner to commit some invasion or violation of a legal right to addressee, or in failing to allege that the pamphlet threatened to be distributed contained untruthful statements. This is an essential element of the offense defined in the statute, for without wrong, there could be no injury.

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 479, 58 S. C. R. 300, 303.

Keogh v. *Ry. Co.,* 260 U. S. 156, 163.

Restatement of the Law of Torts, p. 16, Sec. 7.

Burnsides v. *State,* (Tex.) 102 S. W. 118, 120, 121.

McKay v. *Retail Auto., etc., Union,* 106 Pac. 2d 373, 374, 379 (Calif.)

(a)

It is fatal error to omit an essential element of the offense charged.

United States v. *Hess,* 124 U. S. 483, 487, 8 S. C. R. 571.

United States v. *Cruikshank,* 92 U. S. 542, 558.

United States v. *Carll,* 105 U. S. 611, 613.

Fontana v. *United States,* 262 Fed. 283, 288.

Point C.

The word "injury" is a generic term. Since the result of the act is injurious or merely harmful, depending upon whether the act is tortious or lawful, it is not enough for the indictment to charge that a "threat to injure," was made, as that is but the statement of a conclusion. All of the elements that go to make an "injury" must be pleaded.

(See same cases cited under Point B (a) *Supra* p. 11.)

(a)

Where certain language does not constitute a threat under some circumstances, but does constitute a threat under other circumstances, it is not enough for an indictment to charge that the language was a criminal threat made with the intent to violate the law, since that would be a mere conclusion of the pleader. All of the elements which go to make the threat a crime must be pleaded.

Fontana v. *U. S.*, 262 Fed. 283, 288 (C. C. A. 8).

VI.

ARGUMENT.

Point A.

The statement involved requires as a prerequisite to culpability a "threat to injure." The word "injure" in its legal sense means to wrong a person by the violation of his legal rights, and damage to one without an injury does not lay the foundation for legal action.

The record is void of any competent evidence that the pamphlet which petitioner threatened to distribute was false or untruthful in any particular. In fact counsel for respondent stated in their brief in the Court of Appeals:

> "* * * the question of their falsity is not an issue" (Appellee's Brief p. 11).

Congress in its wisdom selected the word "injure" with a presumed conclusion of its legal meaning as contained in many decisions, laws and text-books. Had it desired to include within the scope of this Act threats to do lawful things, it would have chosen in lieu of "injure" the word "harm" or "damage."

This court in the recent case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479, held:

> "The injury which petitioner will suffer, it is contended, is the loss of its business as a result of the use of the loans and grants by the municipalities in setting up and maintaining rival and competing plants; * * * 'An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim, that a damage to one, without an injury in this sense (*damnum absque injuria*), does not lay the foundation of an action; because, if the act com-

plained of does not violate any of his legal rights, it is obvious that he has no cause to complain * * *. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of right, the person injured is entitled to an action.' *Parker* v. *Griswold,* 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

In the case of *Keogh* v. *Ry. Co.*, 260 U. S. 156, 163, the court held:

"Section 7 of the Anti-Trust Act gives a right of action to one who has been 'injured in his business or property.' Injury implies violation of a legal right."

In Restatement of the Law of Torts, Sec. 7, page 16, it is said:

" 'Injury' and 'harm' contrasted. The word 'injury' is used throughout the Restatement of this Subject to denote the fact that there has been an invasion of a legally protected interest which, if it were the legal consequence of a tortious act, would entitle the person suffering the invasion to maintain an action of tort. It differs from the word 'harm' in this: 'harm' implies the existence of a tangible and material detriment. The most usual form of injury is tangible harm; but there may be an injury although no harm is done. Thus, any intrusion upon the land in possession of another is an injury and, if unprivileged, gives rise to a cause of action even though the intrusion is beneficial or so transitory that it constitutes no tangible interference with the beneficial enjoyment of the land. * * * It is desirable to have a word to denote the type of result which, if the act which causes it is tortious, is sufficient to sustain an action even though there is no tangible harm for which truly compensatory damages can be given. The meaning of the word 'injury', as here defined, differs from the sense in which the word 'injury' is often used which indicates that the invasion of the interest in question has been

caused by conduct of such a character as to make it tortious."

The Court of Criminal Appeals of Texas had a case where a member of a posse threatened to arrest one who was a law violator and then accepted a bribe to release the prisoner. If the defendant was in fact an officer he was not threatening to do an unlawful act in threatening to arrest, but if an officer the threat was to do a lawful act, and therefore nonactionable. Said the Court in vacating a verdict of guilty:

> * * * "there must be a threat to do some illegal act injurious to the character, person or property of the prosecutor by which he is fraudulently induced to part with and deliver something of value to appellant, with intent on his part to appropriate same, and, unless these elements exist in what was done, there is no offense under this article."
>
> *Burnsides* v. *State,* (C. C. A. Tex.) 102 S. W. 118, 120, 121.

In the case of *McKay* v. *Retail Auto Union,* 106 Pac. 2d 373, the Supreme Court of California said:

> (10) "It is equally beside the question to speak of threats, where that which is threatened is only what the party has a legal right to do. In one of his dissenting opinions Mr. Justice Holmes succinctly commented upon the use of such terms as follows: 'I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do—in that event, and thus allow the other person the chance of avoiding the consequence. So, as to "compulsion," it depends on how you "compel"! * * * So as to "annoyance" or "intimidation."' " *Vegelahn* v. *Guntner,* (1896) 167 Mass. 92, 107, 44 N. E. 1077, 1081, 35 L. R. A. 722, 57 Am. St. Rep. 443.

Point B.

The indictment (Appendix A, infra p. 21) is defective in that it fails to set forth facts showing or tending to show a threat by petitioner to commit some invasion or violation of a legal right to addressee, or in failing to allege that the pamphlet threatened to be distributed contained untruthful statements.

The indictment (Appendix *infra* p. 21) contains no word or phrase that identifies or describes the character of the act that petitioner was charged with threatening to commit. That part of it containing the words "injure" and "injury" is as follows:

> "* * * the said communication then and there containing a threat to injure the reputation of the said addressee unless money and other things of value should be paid over to the said George H. Keys, the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

(a)

It is fatal error to omit an essential element of the offense charged.

This court in the case of *United States* v. *Hess*, 124 U. S. 483, 487, said:

> "The doctrine invoked by the solicitor general, that it is sufficient, in an indictment upon a statute, to set forth the offence in the words of the statute, does not meet the difficulty here. Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

And then quoted *United States* v. *Cruikshank,* 92 U. S. 542, as follows:

> " 'It is an elementary principle of criminal pleading that where the definition of an offence, whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species; it must descend to particulars." 1 Arch. Cr. Pr. and Pl. 291.' "

And said this court, speaking through Mr. Justice Gray in *U. S.* v. *Carll,* 105 U. S. 611, 613:

> "In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished: and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

In the case of *Fontana* v. *United States,* 262 Fed. 283, 288, the Court of Appeals adhered to the principles above and cited the above decisions as its authority. We quote:

> " * * * It is an elementary rule of criminal law that where language does not constitute a crime if uttered under some circumstances, and does constitute a crime if uttered under other circumstances, it is not enough to charge that it was used with intent to violate the law. That would be a mere conclusion. The facts must be set forth, so that the court can determine, and not the pleader, whether or not they constitute the crime. *United States* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 31 L. Ed. 516; *United States* v. *Cruikshank et al.,* 92 U. S. 542, 23 L. Ed. 588; *United States* v. *Carll,* 105 U. S. 611, 26 L. Ed. 1135; *Shilter* v. *United States,* 257 Fed. 724, 725 (C. C. A.).

Take, for example, the first charge in the indictment, that the President secured his election on the slogan 'kept us out of war,' and by using his high office whipped the members of Congress into line to secure the authority to enter the war. If that statement was made in a private conversation with a loyal citizen, in the presence of no other person, his utterance of it was not susceptible to the inference that he made it with any of the evil intents charged, or to the inference that it was reasonably calculated to produce the results alleged. Perhaps, however, if it had been made in a public address, in the presence of men who were members of the military or naval forces of the United States, such an utterance might, in view of other things said in the same address, have been susceptible to a different inference. Take the fifth statement, that he 'stated to his congregation and to divers persons, whose true names are to the grand jurors unknown, false and injudicious statements as aforesaid.' That charge is so indefinite and ambiguous that it is clearly insufficient to warrant the introduction of any evidence under it. No court can determine from it whether it means that he made the statements preceding it, or that he made other injudicious statements to them, in the same way that he made the preceding statements. The allegations in the indictment regarding the other statements are likewise indefinite and insufficient, and for the reasons which have been suggested the demurrer to the indictment should have been sustained, and the defendant should have been discharged without a trial."

Point C.

The word "injury" is a generic term. Since the result of the act is injurious or merely harmful depending upon whether the act is tortious or lawful, it is not enough for the indictment to charge that a "threat to injure" was made, as that is but the statement of a conclusion. All of the elements that go to make an "injury" must be pleaded.

(See same cases cited under Point B (a) *supra* p. 11.)

(a)

Where certain language does not constitute a threat under some circumstances, but does constitute a threat under other circumstances, it is not enough for an indictment to charge that the language was a criminal threat made with the intent to violate the law, since that would be a mere conclusion of the pleader. All of the elements which go to make the threat a crime must be pleaded.

The case of *Fontana* v. *U. S.*, 262 Fed. 283, 288 (C. C. A. 8), above quoted, applies the principle contained in this heading. The words of the court to that effect have been quoted under our Point B (a).

The petitioner owed the addressee no enforcible duty to refrain from speaking truthfully with reference to the effects of aluminum kitchen ware upon the human body. The words of Mr. Justice Holmes, spoken as a member of the Supreme Court of Massachusetts to the effect that what you may do in a certain event you may threaten to do, that is "give warning of your intention to do," and "thus allow the other person a chance of avoiding the consequences," are fitting here.

The fact that the statute herein involved may be said to be ambiguous in that a citizen would have to guess at whether his act was or was not a violation of law, did not justify the trial court in submitting to the jury a set of facts involving a mere guess. Nor did the verdict validate the indictment that involved that guess.

Respectfully submitted,

C. W. PRINCE,
WILLIAM R. ROSS,
Attorneys for Petitioner.

APPENDIX A.

United States of America, Plaintiff, vs. George H. Keys, Defendant. No. 15,108.

INDICTMENT.

The grand jurors of the United States of America, duly and legally chosen, selected, summoned and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn and charged to inquire of and concerning crimes and offenses against the United States of America in the Western District of Missouri, upon their oaths present and charge that at Kansas City, Jackson County, Missouri in the Western Division of the Western District of Missouri, and on or about the 4th day of June 1940, one George H. Keys did then and there wilfully and feloniously transmit in interstate commerce by the means of the Post Office establishment of the United States a certain communication addressed to Aluminum Association, 903 American Bank Building, Pittsburgh, Pennsylvania, an association then and there engaged in promoting the manu- (fol. 2) facture, distribution and sale to the public of aluminum for various purposes, and in particular for cooking utensils, with the willful and felonious intent then and there and thereby to extort from the addressee, the said Aluminum Association, money and other things of value, the said communication then and there containing a threat to injure the reputation of the said addressee unless money and other things of value should be paid over to the said George H. Keys, the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking uten-

sils is harmful and is a causative factor in diabetes and other diseases;

Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Richard H. Musser
Assistant United States Attorney.

A True Bill;

W. B. Hodge,
Foreman of the grand jury.

APPENDIX B.

UNITED STATES CIRCUIT COURT OF APPEALS.

EIGHTH CIRCUIT.

No. 12,069.—November Term, A. D. 1941.

GEORGE H. KEYS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court of the United States for the Western District of Missouri.

[March 2, 1942.]

Mr. C. W. Prince (Mr. William R. Ross was with him on the brief) for Appellant.

Mr. Charles F. Lamkin, Jr., Assistant United States Attorney (Honorable Maurice M. Milligan, United States Attorney was with him on the brief) for Appellee.

Before Stone, Thomas and Johnsen, Circuit Judges.

Thomas, Circuit Judge, delivered the opinion of the court.

The appellant was convicted under an indictment which charges a violation of Sec. 408d(c), U. S. C., 18 U. S. C. A., Sec. 408d(c), which provides:

> "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, shall transmit in interstate commerce by any means whatsoever any communica-

tion containing any threat to injure the property or reputation of the addressee or of another. . .shall be fined. . ."

The indictment recites that:

". . .on or about the 4th day of June 1940, one George H. Keys did then and there wilfully and feloniously transmit in interstate commerce by the means of the Post Office establishment of the United States a certain communication addressed to Aluminum Association, 903 American Bank Building, Pittsburgh, Pennsylvania, an association then and there engaged in promoting the manufacture, distribution and sale to the public of aluminum for various purposes, and in particular for cooking utensils, with the willful and felonious intent then and there and thereby to extort from the addressee, the said Aluminum Association, money and other things of value, the said communication then and there containing a threat to injure the reputation of the said addressee unless money and other things of value should be paid over to the said George H. Keys, the said injury to the reputation of the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

The appellant's contention in this are (1) that the evidence is insufficient to establish intent and threat and (2) that the indictment is insufficient.

The first contention is without merit. The question presented was raised in the lower court by objection to the admission of evidence and by motion for a directed verdict. The government introduced in evidence a "communication" consisting of a letter addressed to Aluminum Association, Pittsburgh, Pennsylvania, and a

pamphlet. The defendant testified in his own behalf and admitted that he sent both documents. These papers[1] contain sufficient statements to warrant the jury in finding both intent and a threat.

The second contention is more serious. The alleged defect in the indictment is that it does not embody a copy of the "communication" including the letter and pamphlet. It is pointed out that the indictment does not show the date of the letter nor state the name of the author, and that the charge that it contains a threat is a conclusion of the pleader.

The indictment was not assailed in the trial court by motion for a bill of particulars or otherwise; but where an indictment is challenged for the omission of an essen-

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[1](a) The letter:

Geo. H. Keys
3406 Indiana Ave.
Kansas City, Mo.
June 4, 1940

ALUMINUM ASSOCIATION
903 American Bank Bldg.
Pittsburg, Penna.

Attention: Secretary

Dear Sir:

We are very familiar with all of your underhand politics and detrimental activity. I'm enclosing a reminder of the true status of ALUMINUM.

These articles should sell very quickly and in great quantity at $1.50 Per M. F.O.B. Chicago and Kansas City. They are on very good paper, well laid out and contain some very helpful and valuable information.

I expect to get under way next week in a trial distribution for checking territory activity after saturation. As you have so successfully locked my mail up, I will now be free to take up this educational activity. The many - - many sick people will appreciate this information very much, especially the diabetics as they are greatly helped.

Now gentlemen it all sums up to this. If you think you would rather have me in the food business you can open up the NATUR-FOOD mails. If you would rather have me devote my time to the writing of literature, health lessons and educational work along these lines, why - - - just leave your dirty work as is and keep the NATUR-FOOD mail stopped.

tial element of the crime the objection may be asserted in this court for the first time. *Harris* v. *United States*, 8 Cir., 104 F. 2d 41, 43; *Nicholson* v. *United States*, 8 Cir., 79 F. 2d 387; *Dropps* v. *United States*, 8 Cir., 34 F. 2d 15.

The essentials of the crime defined in the statute are (1) an intent to extort money; (2) the transmission in interstate commerce of a communication (3) containing a threat to injure the property or reputation of the addressee or another.

The indictment attempts to charge these essentials by pleading that the defendant (1) "with the willful and felonious intent. . .thereby to extort from the addressee, the said Aluminum Association, money. . .(2) did transmit in interstate commerce by means of the Post Office establishment of the United States. . .a certain communication addressed to the Aluminum Association (3) containing a threat to injure the reputation of the said addressee unless money. . .should be paid over to" the defendant,---"the said injury to the reputation of

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If you are in sympathy with the TRU-SCIENCE educational work, I am sure Miss Randall will appreciate your contribution very much as it will go to help so many people. Address all contributions to TRU-SCIENCE. Make all checks payable to Miss Thelma Randall.

Yours very truly,

Geo. H. Keys.

Appellant testified that Miss Thelma Randall is his assistant. (b) The pamphlet enclosed with the foregoing letter is set out in the record. It is too long to be copied in full. It is headed: Are there Dangers in the use of Aluminum Cooking Utensils?. . . Congress should Investigate the Aluminum Association and the American Medical Ass'n. Help the Cause! Buy these pamphlets for your relatives and friends. Pass them on. 5c each - - 80c per 100 Published by Tru-Science Reliance Bldg. Kansas City, Missouri. A National Movement.

The text of the pamphlet, fairly summarized in the indictment, is "to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

the addressee contemplated as aforesaid being embraced by a threat in said communication contained that the said George H. Keys would distribute a pamphlet to the public to the effect that the use of aluminum cooking utensils is harmful and is a causative factor in diabetes and other diseases."

In *Cochran and Sayre* v. *United States,* 157 U. S. 286, 290, the Supreme Court said that the "true test" of an indictment is, "not whether it might possibly have been made more certain, but [1] whether it contains every element of the offence intended to be charged, and [2] sufficiently apprises the defendant of what he must be prepared to meet, and, [3] in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

In *Hagner* v. *United States,* 285 U. S. 427, 431, 52 S. C. R. 417, the Court said: "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded." And Sec. 556, Title 18 U. S. C. A. (Sec. 1025, Revised Statutes) provides:

> "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. . ."

In *Hagner* v. *United States, supra,* the Court said:

> "This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading.
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> * * * * * * * *
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> "It, of course, is not the intent of Section 1025 to dispense with the rule which requires that the es-

sential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment."

Under these rules most of appellant's criticism of the indictment fail for want of substance. All the elements of the offense are charged; and, in so far as the present trial is involved, no prejudice is shown. The appellant admitted the sending of the letter, prepared for trial, and offered evidence in an attempt to explain the contents of the letter in such a way as to demonstrate his innocence. The only problem is whether the failure to set out a copy of the letter and pamphlet *in haec verba* is a defect of substance or of form only. At common law an indictment for sending a threatening letter, or for forgery or libel, was required to be set out *in haec verba*. *Bradlaugh* v. *The Queen*, L. R. 32, B. D. 618; and the federal courts have in some instances followed or repeated the rule. *United States* v. *Noelke*, C. C. N. Y., 1 Fed. 426, 433; *Wilson* v. *United States*, 2 Cir., 275 Fed. 307, 312. In these cases it was held or stated obiter that a failure to set out a literal copy of the document is a defect of substance and not of form. The more modern view, we think, is to the contrary. In *United States* v. *Goldsmith*, 2 Cir., 68 F. 2d 5, 7, (cert. den., 291 U. S. 681), the defendant was charged with uttering a forged instrument under Sec. 28 of the Criminal Code (18 U. S. C. A. Sec. 72), and the indictment did not set out in full the instrument alleged to have been uttered as a forgery. This was urged as a fatal defect. The court held, in a well-reasoned opinion, that "the defect in pleading was one which could be cured by verdict." We agree with the result; and we perceive no reason why the rule is not applicable to a threatening letter as well as a forgery. In the instant case all the necessary facts can be found by fair construc-

tion within the terms of the indictment. See also *Sparks* v. *United States*, 6 Cir., 90 F. 2d 61, 63; *Nicholson* v. *United States*, 8 Cir., 79 F. 2d 387, 389; and compare *Corbett* v. *United States*, 8 Cir., 89 F. 2d 124, 127; *Hewitt* v. *United States*, 8 Cir., 110 F. 2d 1, 5; *Muench* v. *United States*, 8 Cir., 96 F. 2d 332, 335; *Kane* v. *United States*, 8 Cir., 120 F. 2d 990, 992.

Appellant insists that prejudice results because he may be exposed to a second prosecution for the same offense, in which case upon a plea of double jeopardy he could not identify the "communication" upon which the present charge is based for the reason that it is insufficiently described in the indictment. The indictment sets out the date the letter was mailed, the name of the addressee and by reference the nature of its contents. It does not state the date on which it was written, the place where it was written nor the name of the person, if any, who signed it. These are not essentials of the offense. The crime was complete even though the letter bore no date and the name of the author and the place where it was written were unknown. There could in fact be no confusion for any of the reasons assigned. It does not appear that another letter of the same kind was at any time sent or received. The fact that the defendant upon reading the indictment recognized the letter referred to and made no objection to the description at the time indicates the want of merit in his present criticism. The date on which the indictment letter was sent, the name of the addressee and the reference to its contents in the indictment constitute a sufficient identification. See *Scheib* v. *United States*, 7 Cir., 14 F. 2d 75, 77; *Durland* v. *United States*, 161 U. S. 306; *State* v. *Stewart*, 90 Mo. 507; *Corbett* v. *United States*, *supra*.

Other alleged defects in the indictment are argued, but they are not substantial. It is claimed, for example, that the indictment failed to charge that the pamphlet which defendant threatened to distribute contained false representations and that defendant knew them to be false.

These matters are not elements of the offense defined in the statute. They are, therefore, immaterial. *Warren* v. *United States*, 8 Cir., 183 F. 718; *Rosen* v. *United States*, 161 U. S. 29; *State* v. *McCabe*, 135 Mo. 450.

Again, it is argued that an "injury" means the violation of one's legal rights; that there is no claim that any legal right of the addressee, Aluminum Association, was violated; that the statements in the letter and pamphlet are true; that the defendant had a right to distribute them; and that a threat to do something which a person has a right to do is not a threat in a legal sense. None of these alleged omissions constitutes defects open to attack after verdict and in this court. None of them is an essential element of the offense. In so far as they relate to burden of proof the defendant's rights could be protected in the charge to the jury. The instructions of the court are not set out in the transcript of record. In such circumstances we presume that, if requested, the court properly instructed upon all these matters and that the jury found against defendant upon all of them. *Hagner* v. *United States, supra,* at page 433.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1217

GEORGE H. KEYS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the circuit court of appeals affirming the judgment of conviction was entered March 2, 1942 (R. 64–65). A petition for rehearing (R. 65–68) was denied March 26, 1942 (R. 68). Excluding March 26, Sundays (March 29, April 5, 12, 19, 26), and holidays (April 13, a legal holiday in Missouri, II Mo. Rev. Stat. (1939), sec. 15313, p. 3881, the State in which the suit was brought), the thirty-day period prescribed by Rule XI of the Rules in Criminal cases (292 U. S. 661, 666) for filing a petition for writ of certiorari expired May 1, 1942. The petition for the writ was not filed

until May 5, 1942. We are advised by the Clerk that no order extending the time for filing was made by a Justice of this Court. Accordingly, the petition is out of time and should be dismissed for want of jurisdiction.[1]

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

MAY 1942.

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[1] Compare *Rust Land Co.* v. *Jackson*, 250 U. S. 71, 76; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417–418; *Hartford Accident Co.* v. *Bunn*, 285 U. S. 169, 178.

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